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In the Supreme Court of the United States.

OCTOBER TERM, 1922.

No. 429.

UNITED STATES OF AMERICA, *Appellant*, AND INTERSTATE COMMERCE COMMISSION, *Intervening Appellant*,

v.

THE STATE OF TENNESSEE, THE RAILROAD AND PUBLIC UTILITIES COMMISSION OF TENNESSEE, COMPOSED OF B. A. ENLOE, CHAIRMAN, HARVEY H. HANNAH, AND JULIAN H. CAMPBELL, COMMISSIONERS, AND THE STATE OF TENNESSEE, ON RELATION OF THE RAILROAD AND PUBLIC UTILITIES COMMISSION OF TENNESSEE, *Appellees*.

APPEAL FROM THE UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION.

BRIEF FOR THE UNITED STATES.

STATEMENT.[1]

Under the Urgent Deficiencies Act of October 22, 1913 (38 Stat. 219), appellants appealed from the

[1] This appeal was advanced for hearing with No. 396, *Nashville, Chattanooga & St. Louis Railway Co.* v. *State of Tennessee*. With the exception of the appeal papers, the transcripts of record in the two cases are identical. To avoid confusion resulting from duplication of printing, appellants have printed their appeal papers only. With the consent of all of the parties and with the permission of the Court all other references will be to the transcript in No. 396.

final decree (No. 396, Tr. 52) of the District Cou
(Circuit Judge Denison and District Judges Sanfo
and Ross, concurring), who, after a full opinion
the merits (No. 396, Tr. 47), permanently annull
and enjoined the order of the Interstate Commer
Commission (No. 396, Tr. 39).[2]

[2] This case being a proceeding instituted by the Commission up
petition filed, and having been duly heard and submitted by the parti
and full investigation of the matters and things involved having been h
and the Commission, on the date hereof, having made and filed a rep
containing its findings of fact and conclusions thereon, which said rep
is hereby referred to and made a part hereof:

It is ordered, That the common carriers by steam railroad parties to t
proceeding, namely, * * * according as they respectively participa
in the transportation, be, and they are hereby, notified and required
cease and desist from practicing the undue prejudice, undue preferen
and advantage, and unjust discrimination found in said report to exist
the relation of interstate rates for the transportation of stone and gravel,
carloads, when for use in the construction of public highways and consign
to Federal, State, county, or municipal authorities or their bona fide agen
and to establish, put in force, and maintain rates for the transportation
said commodities in intrastate commerce within the State of Tennes
which shall exceed the rates of said respondents for the transportation
said commodities in effect July 29, 1920, and applicable to such transp
tation, in amounts corresponding to the increases heretofore made by sa
respondents and now in effect under Ex Parte 74 referred to in said repo
in said respondents' rates for the transportation of said commodities
interstate commerce within the State of Tennessee and between points
the State of Tennessee and points in adjoining States: *Provided, howev*
That nothing in this order shall be construed as requiring or authorizing a
common carrier to establish, put in force, or maintain any rate for the tra
portation of property in intrastate commerce which is greater than its cor
sponding rate contemporaneously in effect and applicable to the transp
tation of property in interstate commerce from, to, or at the same points.

It is further ordered, That nothing in this order shall be construed as p
hibiting any carrier, party to this proceeding, from increasing any rate
the transportation of property in intrastate commerce, prescribed in th
order, provided such increased rate does not exceed its corresponding ra
contemporaneously in effect and applicable to the transportation of pro
erty in interstate commerce, and provided further that such increase
made pursuant to the laws of the State of Tennessee, and with the approv
of the authorities of said State.

THE FACTS.

In *Ex parte 74*, Increased Rates 1920, 58 I. C. C. 220, the Interstate Commerce Commission authorized general freight rate increases, Eastern Group 40%, Southern Group 25%, Western Group 35%, Mountain-Pacific Group 25%; all passenger fares, rates on excess baggage, and rates on milk and cream, 20%, and a surcharge of 50% on the charge for space in sleeping and parlor cars.

On November 19, 1920, Railroad and Public Utilities Commission of Tennessee, after hearing evidence and argument concerning the proposed advance in intrastate rates, entered its order authorizing the several railroads in Tennessee to increase certain of the intrastate rates in amounts proportionate to the increases in interstate rates authorized by the order in *Ex parte 74* (No. 396, Tr. 14).[3] This order of the Utilities Commission provided that the railroads make no advances in the rates on intrastate shipments of sewer pipe (earthen, clay, or concrete), carload, over and above the rates on those commodities as in effect immediately prior

[3] The Commission having on date hereof made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof,

It is ordered, That the carriers respondents herein be, and they are hereby, notified and required to cease and desist from and after date hereof, and thereafter to abstain from publishing, demanding, or collecting any higher rates for the transportation of intrastate freight between points in Tennessee than in the succeeding paragraphs hereof; and

It is further ordered, That the Southern Railway may charge for and collect on intrastate shipments of common brick, carload, minimum 10,000 brick, the mileage scale as hereinbefore set out, and that no change be made in the application of said mileage scale; other intrastate rates on common brick, carload, as published by respondent carriers and in effect immediately prior to this original suspension, may be advanced 25 per cent, provided that no

to the date of the original suspension; *nor on carload shipments on stone and gravel moving intrastate between points in Tennessee, when for use in building public highways and consigned to Federal, State, county, or municipal authorities, or their bona fide agents.*

On December 23, 1920, Nashville, Chattanooga & St. Louis Railway and other companies filed their petition before the Interstate Commerce Commission averring that the order of the Utilities Commission created an undue burden upon interstate commerce, by unduly and unjustly preferring shippers and localities in Tennessee against shippers and localities in other states (No. 396, Tr. 4).

After investigation and hearing the Interstate Commerce Commission found that the intrastate rates on common brick and sewer pipe, in carloads, between points in Tennessee, were not shown to cause any undue, unreasonable, or unjust discrimination against interstate or foreign commerce (No. 396, Tr. 38). The Commission also found the lower

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advanced rate shall exceed the mileage scale of the Southern Railway as hereinbefore set out. In assimilating the different rates and mileage scales an estimated weight of 5 pounds per brick shall be used; and

It is further ordered, That respondents hereto shall make no advances in their rates on intrastate shipments of sewer pipe (earthen, clay, or concrete), carload, over and above the rates on said commodities as in effect immediately prior to the date of this original suspension, and

It is further ordered, That on carload shipments of stone and gravel moving intrastate between points in Tennessee, when for use in building public highways and consigned to Federal, State, county or municipal authorities, or their bona fide agents, that carriers respondent hereto shall make no advance in the rates and charges over and above those in effect immediately prior to the effective date of the original suspension on these commodities, and

It is further ordered, That this order shall continue in effect for a period of not less than two years from date when it shall take effect, unless otherwise ordered by this Commission.

intrastate rates and charges for the transportation of stone and gravel when used in the construction of public highways and consigned to Federal, State, County, or Municipal authorities, or their bona fide agents, in force on the date of the decision in *Ex parte 74*, resulted in undue prejudice to persons and localities in interstate commerce between points in Tennessee and points in adjoining States, and in unjust discrimination against interstate commerce (No. 396, Tr. 38, 39).

The Interstate Commerce Commission ordered that the intrastate rates be increased to the level of the interstate rates in effect under *Ex parte 74* on stone and gravel, to the end that the undue prejudice, preference, and discrimination should be removed (No. 396, Tr. 39, 40; *ante*, note, p. 2).

The single question raised by the Government's motion to dismiss and its assignments of error is, Was the Interstate Commerce Commission without jurisdiction to enter the order because of the provisions in Section 22 of the Act to Regulate Commerce?

ARGUMENT.

I.

BY THE INTERSTATE COMMERCE ACTS SECTION 22 IS IN LEGAL EFFECT STAMPED ON THE FACE OF EVERY TARIFF AND EVERY ORDER OF THE INTERSTATE COMMERCE COMMISSION WHICH ARE SUBJECT THERETO AT ALL TIMES AND NO COURT BY INJUNCTION OR COMMISSION BY ORDER MAY ENFORCE ITS PERMISSIVE PROVISIONS AGAINST THE CARRIERS.

The State of Tennessee makes no allegation with respect to the reasonableness of the rates prescribed in *Ex parte 74*, or the validity of the order entered in

pursuance thereof. On the contrary, the State rests its whole case on *Ex parte 74* as a foundation. No allegation is made and no proposition is advanced that if the property belonged to shippers or consignees other than the State of Tennessee and its governmental subdivisions, or the Government of the United States, that the order of the Commission would be invalid.

The peculiar character of the owner is the sole basis on which the invalidity of the order is claimed.

Section 22 provides (25 Stat. 855, 862):

> *That nothing in this act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, State or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat,* or the free carriage of destitute and homeless persons transported by chartiable socities, and the necessary agents employed in such transportation, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers and of Soldiers' and Sailors' Orphan Homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes; nothing in this act shall be construed to prevent railroads

> from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; and nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies.

The italicized lines have stood unchanged since the first act of February 4, 1887, was passed (24 Stat. 379, 387),[4] except the words "apply to" in the first line of the act of 1887 were changed to "prevent" in the act of 1889.

Sec. 24. Ch. 10, Laws of Tenn., 1897, p. 122, does not permit transportation free or at reduced rates "for United States, State or municipal governments."

The petition alleges (No. 396, Tr. 10):

> Petitioners further aver that the order of the Interstate Commerce Commission under such circumstances and conditions, constitutes an unwarranted and unauthorized interference with the reserved powers of the State of Ten-

[4] SECTION 22. *That nothing in this act shall apply to the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat,* or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion; nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; and nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies: *Provided*, That no pending litigation shall in any way be affected by this act (24 Stat. 379, 387).

nessee, acting through its Railroad and Public Utilities Commission, in the control of purely intrastate transportation by common carriers, since it prevents the said Railroad and Public Utilities Commission of Tennessee from making a rate for the transportation of governmental property in Tennessee which it finds to be a reasonable rate for such transportation, simply because the same carriers, and other carriers, have filed with the Interstate Commerce Commission a schedule or schedules of rates on interstate shipments of governmental property from adjoining States to points in Tennessee, which are proportionately higher than the intrastate rates found by the Tennessee Railroad and Public Utilities Commission to be reasonable, when the interstate carriers are not required by the Act of Congress, nor by the rulings of the Interstate Commerce Commission to adhere to or maintain the published schedules of rates, but are authorized both by the Act of Congress and by the rulings of the Interstate Commerce Commission to enter into secret and private agreements for the transportation of such property in interstate commerce without notice to the Interstate Commerce Commission or any other governmental agency.

Petitioners aver that the true and proper construction of Section 22 of the Interstate Commerce act is that preference and discrimination in the transportation of governmental property in interstate commerce is not unjust discrimination and not undue or unreasonable preference, and such discrimination and preference are therefore not unlawful.

On the Government's motion to dismiss, the learned District Court held (No. 396, Tr. 51):

> Of course this giving of a preference under Section 22 is wholly permissive; the section does not confer upon any municipality the right to demand a preference. Nevertheless, the existence of the power is of value to the municipalities. They thereby get the right to competition in rates among the carriers for this traffic.
>
> * * * * *
>
> The Interstate Commission's whole power to regulate interstate commerce is modified by the exception that it may not forbid discrimination in favor of a state. Its power to control intrastate commerce must be modified by the same exception.

The learned District Court thus held that the provisions of Section 22 are permissive only. That being so, it is clear that the United States, State, or Municipal governments may not sustain a complaint before the Interstate Commerce Commission, under the interstate-commerce laws, to compel carriers to carry, store, or handle property free or at reduced rates. If the Interstate Commerce Commission entered an order directing the carriers to carry free or at reduced rates the coal consumed by the United States Navy, or by the State of New York or the city of Chicago in the maintenance of their institutions, such an order would immediately be adjudged null and void by any court called on to interpret it. And that being so, *a fortiori*, how may the State of Tennessee, sustain such a complaint on intrastate

traffic before the Interstate Commerce Commission, either under the interstate-commerce laws or under the Tennessee railway acts,[5] which do not permit transportation free or at reduced rates "for United States, State or municipal governments" (*ante* 7).

Unless the carriers prefer voluntarily to act under Section 22, the State of Tennessee with its road building stands precisely as if Section 22 were not in the statute (*Railroad Commission of Wisconsin* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563; *State of New*

[5] Baldwin's Cumulative Code, 1920, § 3059a–14. *To fix freight and passenger rates; other powers as to abuses, unjust discrimination, location of depots, etc.*—Authority is hereby vested in the railroad and public utilities commission of Tennessee, and it is hereby made its duty to supervise and fix the rates, charges, and regulations of railroad freight and passenger tariffs; to correct abuses and to prevent unjust discrimination and extortions in the rates for freight and passenger tariffs on the different railroads in this State, and to require the location of such depots and the establishment of such freight and passenger buildings as the conditions of the roads, safety of freight, and public comfort may require. (1897, ch. 10, sec. 8; 1907, ch. 390, sec. 2; 1919, ch. 49, sec. 1.)

§ 3059a–46. *Complaints, hearing of; rates or charges determined; may make orders that railroads, etc., shall cease from exacting rates, following rules, etc.*—Whenever, after full hearing upon complaint or investigation instituted by the commission of its own motion, authorized under sections 3059a–3059a–59, the railroad and public utilities commission of the State of Tennessee shall be of opinion that any rates, charges, rules, or regulations which are made the subject of complaint or investigation are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or result in extortion, or are otherwise in violation of any of the provisions of said acts, said commission is hereby required, authorized, and empowered to determine what will be just and reasonable individual or joint rate or rates, charge or charges, to be thereafter observed in such case as maximum, and what individual or joint classification, rule, regulation, or practice is just, fair, and reasonable to be thereafter followed, and to make an order that any railroad company or any other person, party, or corporation subject to its jurisdiction shall cease and desist from exacting the rates or charges, or following the rules, regulations, or practices condemned, and shall not thereafter publish, demand, or collect any rate or charge for such transportation or transmission in excess of the maximum rate or charge so prescribed, and shall not adopt the classification and shall conform to and observe the regulation, rule, or practice so prescribed. (1897, ch. 10, sec. 32a; 1919, ch. 49, sec. 1.)

York v. *United States*, 257 U. S. 591; *Lehigh Valley Railroad Co.* v. *Public Service Commission*, 272 Fed. Rep. 758, 767; *City of New York* v. *United States*, 272 Fed. Rep. 768) as there is no power to enforce it against the carriers.

The affected carriers are here insisting on the enforcement of the statute. Their position is in all respects the same as that of the carriers in the cases cited. Obviously, it never occurred to the representatives of the State of Wisconsin, or the State of New York, or the city of New York, that they were entitled to an injunction under Section 22; nor has it ever occurred to anyone, shipper or carrier, in those cases, that if any carrier volunteered to carry for the United States, State or Municipal governments any property free or at reduced rates under Section 22, that the order in *Ex parte 74* prevented it from doing so. The order in *Ex parte 74* not only does not override the statute but it is subject thereto as if Section 22 was written across the face thereof.

The Interstate Commerce Commission has always so interpreted Section 22 (Conference Rulings, Bulletin No. 7, November 1, 1917; No. 396, Tr. 8).

In *Metropolitan Paving Brick Co.* v. *Ann Arbor Railroad*, 17 I. C. C. 197, 204, the Commission said:

> The paving-block interests insist that their product should be placed in a class by itself. It is asserted that shipments to eastern points are required to meet competition with asphalt, cedar block, bitulithic, and other paving material, and that except on the very lowest rate

the traffic will not move in good volume. It is further argued that the paving block used for paving streets, alleys, and roads is non-competitive with the other grades. As has been stated, there is a large use, which is on the increase, of paving block for building purposes. To meet this condition the paving interests suggest a classification limited to paving brick and block for the immediate use of the United States, state or municipal governments. So far as the use of paving blocks or brick for the use of the United States, state, or municipal governments is concerned, reference is made to section 22 of the act to regulate commerce which gives the carriers the right to transport traffic for the above-named authorities at reduced rates if they see fit to do so. This can be done notwithstanding the conclusion reached in this case. *What carriers may do is one thing and what they ought to be required to do is quite another thing. Certainly the Commission has no power under the law to order carriers to transport traffic for the United States, state, or municipal governments at reduced rates.* Furthermore, it is a matter of common knowledge that the United States, state, and municipal authorities rarely lay pavements themselves. Work of this kind is usually let by contract. We know of no reason why lower rates should be made for contractors of brick paving than should be made in favor of any other party who may have contracts for other work for public authorities. (Italics ours.)

In *Eschner* v. *Pennsylvania Railroad*, 18 I. C. C. 60, 63, the Commission, referring to that part of Section 22 which provides "that nothing in this act shall prevent * * * the issuance of mileage, excursion, or commutation passenger tickets," said:

> This language, as will be observed, is altogether permissive and has never been understood as giving the Commission authority to require interstate carriers to sell interstate transportation in that form. In *Field* v. *Southern Ry. Co.*, 13 I. C. C. Rep. 298, when that clause was under consideration, we said: "The Commission has no affirmative power to require carriers to establish special fares, based upon less than the normal passenger-mile revenue, for the use of passengers on particular occasions or for special purposes. This was so held in *Cator* v. *So. Pac. Co.*, 6 I. C. C. Rep. 113, and in *Sprigg* v. *B. & O. R. R. Co.*, 8 I. C. C. Rep. 443, and the question is not to be regarded therefore as open to further discussion."

In *United States* v. *Union Pacific*, 28 I. C. C. 518, 524, the Commission said:

> In so far as the laws administered by this Commission are concerned, the right of carriers to transport government property free or at reduced rates is elective and not mandatory. The carriers may, and frequently do, avail of this right and without tariff authorization, but this Commission is not empowered to require carriers to grant to the United States free transportation or other rates or concessions than those afforded the

general public. No duties are delegated to us under, and we can not assume to interpret or determine the purpose or scope of, the so-called public highways act or of statutes under which rights and privileges may be reserved to the United States in return for subsidies in lands or bonds or loan of credit. If the denial of the through routes and joint rates here sought tends to deprive the government of the full benefit of land-grant deductions reserved to it by statute, remedy must be sought at other hands than ours.

II.

THE UNITED STATES HAS FREQUENTLY INVOKED THE JURISDICTION OF THE INTERSTATE COMMERCE COMMISSION AND ITS POWER AND AUTHORITY TO REVISE THE RATES, FARES, AND CHARGES WHICH THE GOVERNMENT WAS FORCED TO PAY FOR THE CARRIAGE OF PERSONS AND PROPERTY.

In numerous instances the Government has invoked the jurisdiction of the Commission to attack rates, fares, and charges for the carriage of persons and property by filing complaints to the end that it, like any other shipper, might secure the benefits inuring from the provisions of the statute.

United States v. *N. Y., P. & N. R. R. Co.*, 15 I. C. C. 233, unreasonable rates on cartridges and powder, Norfolk to Annapolis, condemned and reparation awarded.

United States v. *B. & O. R. R. Co.*, 15 I. C. C. 470, fares for naval recruits from Pittsburgh to Newport, R. I., condemned as unreasonable and reparation awarded.

United States v. *Adams Express Co.*, 16 I. C. C. 394, unreasonable rates on merchandise, Washington, D. C., to Bremerton, Washington, condemned and reparation awarded.

United States v. *Denver & Rio Grande*, 18 I. C. C. 7, demurrage charges on certain carloads of cement detained at Thistle Junction, Utah, disallowed (subsequently reversed).

United States v. *Alabama & Vicksburg Railway*, 40 I. C. C. 405, rates established for the transportation of stamped envelopes and stamped newspaper wrappers in carloads from Dayton, Ohio, and of stamped postal cards in carloads from Washington, D. C., to various distribution points throughout the United States. The Commission said:

> Section 22 of the act to regulate commerce provides "That nothing in this act shall prevent the carriage * * * of property free or at reduced rates for the United States * * *." No rates are published on the articles involved by any of the defendants, and only the southern classification provides a rating for them.
>
> Defendants challenge our power to require the establishment of ratings, on the ground that they are not "common carriers" of government stamped articles, but are essentially private carriers under special contracts. They have been and are, however, ready and willing to transport these articles for the government at rates satisfactory to them, and we are not asked to prescribe ratings for the benefit of the general public. Under the circumstances

we think we have authority to prescribe re
sonable ratings for the traffic in questio
although, under section 22 of the act, the ca
rier and the government may agree upon so
other rate. Conference Ruling 36. The tar
rate or classification rating is the maximu
which the carriers may demand from the go
ernment. Conference Ruling 218.

United States v. *Union Pacific Railroad Co.*,
I. C. C. 518, 520, *supra*. Complaint seeking throu
routes and joint rates from Chicago *via* certa
points in the northwest for transportation of proper
of complainant. Hearing on the merits and rel
denied. The Commission said:

The fact that this proceeding was institut
by the auditor for the Interior Departme
and that it does not appear that any executi
or superior officer or lawfully empowered d
partment of the government authorized su
action to be taken in the name of the Unit
States presents in the view of defendan
reason for dismissal. Counsel for petition
states, however, that while the officer signi
the petition could not institute a suit in
United States court without authority fro
the Department of Justice, such authority
not a prerequisite in proceedings before th
Commission. The provisions of the act wi
respect to those who may apply to the Co
mission concerning things done or omitted
be done by common carriers subject there
are broad. Primarily our authority is ov
the subject matter of a complaint and th
parties complained of. In this instance th

> proper parties defendant are before us, full hearing has been had, and the material facts have been presented, and we are not deprived of jurisdiction to consider the merits of the controversy merely because delegation to the officers presenting the complaint of the right to do so in the name of the United States is not affirmatively shown.

Boise Lumber Co. v. *Pacific & Idaho Northern*, 33 I. C. C. 109, United States, intervenor, unreasonable rates on logs condemned, reasonable rates prescribed, and reparation awarded.

United States v. *Sumpter Valley Railway Co.*, 53 I. C. C. 607, complaint to establish through routes and reasonable joint rates on Government timber. Hearing on the merits and relief denied.

If the cases cited mean anything, it is that Section 22 may be made applicable only by the voluntary action of the carriers, and that such action may be exercised independently of any action by the Commission. On the other hand, if the carriers refuse voluntarily to act, and invoke the other provisions of the statute, Section 22 is inapplicable and all the provisions apply as well to property of the Government as to that of any other shipper.

The principal cases cited, in the opinion of the learned District Court, are readily distinguishable and neither controlling nor applicable.

In *Pennsylvania Railroad* v. *Towers*, 245 U. S. 6, 10, this Court, speaking through Mr. Justice Day, said:

> The *Lake Shore Case* did not involve, as does the present one, the power of a State commission to fix intrastate rates for commutation

> tickets where such rates had already been put in force by the railroad company of its own volition, and we confine ourselves to the precise question presented in this case, which involves the supervision of commutation rates when rates of that character have been voluntarily established by the carrier. The rates here involved are wholly intrastate. The power of the States to fix reasonable intrastate rates is too well settled at this time to need further discussion or a citation of authority to support it.

In *Lake Shore & Michigan Southern* v. *Smith*, 173 U. S. 684, 691, this Court held that the act of the legislature of Michigan providing that one thousand-mile nontransferable tickets shall be kept for sale at reduced rates at the principal ticket offices of all railroad companies was a taking of the companies' property without due process of law. Mr. Justice Peckham said:

> And it (the act) assumes to regulate the time in which the tickets purchased shall be valid and to lengthen it to double the period the railroad company has ever before provided. It thus invades the general right of a company to conduct and manage its own affairs, and compels it to give the use of its property for less than the general rate to those who come within the provisions of the statute, and to that extent it would seem that the statute takes the property of the company without due process of law.

In *Interstate Commerce Commission* v. *Baltimore & Ohio*, 145 U. S. 263, 279, this Court, speaking through

Mr. Justice Brown, sustained the right of the carrier to issue a "party-rate ticket" for the interstate transportation of ten or more persons in interstate commerce at a lower rate than that charged to a single individual for a like transportation on the same trip, and held that the higher rate was not "an unjust and unreasonable charge" under Section 1, nor an "unjust discrimination" under Section 2, nor an "undue or unreasonable preference or advantage" within the meaning of Section 3. While reference is made to Section 22, it does not appear that the opinion was rested on that section, of which the court said (p. 278), "this section is rather illustrative than exclusive." The opinion appears to have been based on other sections of the act as indicated by the further language of the court (p. 279):

> In view of the fact, however, that every railway company issues such tickets; that there is no reported case, State or Federal, wherein their illegality has been questioned; that there is no such case in England; and that the practice is universally acquiesced in by the public, it would seem that the issuing of such tickets should not be held an unjust discrimination or an unreasonable preference to the persons traveling upon them.

Section 22 has a distinct place in that it may be availed of by the carriers in times of disasters and calamities. All remember the Galveston cyclone, the San Francisco fire, and the Dayton flood. The World's Columbian Exposition at Chicago and the Panama-Pacific Exposition at San Francisco and

the construction and dismantling of the buildings thereof are likewise well within the recollection of all. Acts of the carriers in carrying food, clothing, shelter, construction materials and supplies, free or at reduced rates under Section 22 by reason of such circumstances, do not necessarily subject the carriers to the legal obligation to carry stone and gravel at reduced and discriminatory rates for road building in Tennessee.

The United States is one of the largest of all shippers. To affirm the judgment and sustain the position of appellees would be to take the Government traffic for which it now pays regular rates from under the protection of the interstate commerce laws and make it the subject of special rates and special considerations such as the State Commissions may see fit to impose. The consequent risks and disadvantages will far more than counterbalance the slight benefits which now accrue to the Government from the few concessions which the carriers may voluntarily grant under Section 22. The reversal of the judgment will give the Government the benefit of both regular rates under the interstate commerce laws and such special concessions as it may secure under Section 22, and no harm will come to anyone. This was clearly the Congressional intent and it ought to prevail.

The judgment should be reversed, the injunction dissolved, and the petition dismissed.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

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No. 429.

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

UNITED STATES, AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

v.

THE STATE OF TENNESSEE, ET AL., APPELLEES.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

J. CARTER FORT,
For Interstate Commerce Commission.

P. J. FARRELL,
Of Counsel.

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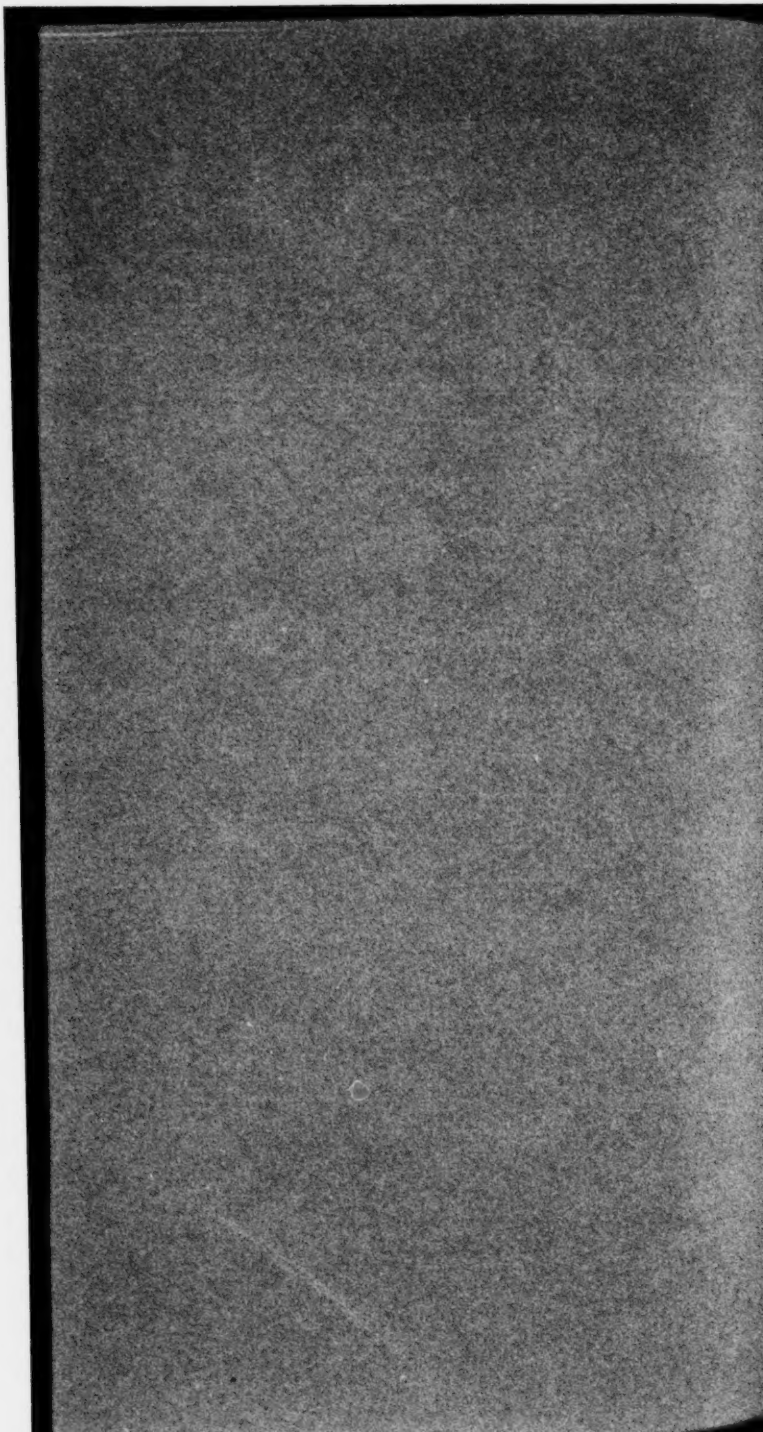

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In the Supreme Court of the United States

OCTOBER TERM, 1922.

UNITED STATES, AND INTERSTATE COMMERCE COMMISSION, appellants,
v.
THE STATE OF TENNESSEE, ET AL., APPELLEES. } No. 429.[1]

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

STATEMENT OF THE CASE.

PRELIMINARY.

This is an appeal by the United States and the Interstate Commerce Commission[1] from a final decree of the United States District Court for the Middle District of Tennessee (Denison, Circuit Judge,

[1] A separate appeal, No. 396, was perfected by the Nashville, Chattanooga & St. Louis Railway and certain other railroad companies which intervened below. The two appeals raise the same questions and will be argued together. The transcript of record in No. 396 has been printed and by agreement of the parties is to be taken also as the record in this case, No. 429, with the exception of the appeal papers. The appeal papers in No. 429 are separately printed. Record references herein refer to the printed transcript of record in *Nashville, Chattanooga & St. Louis Ry.* v. *State of Tennessee et al.*, No. 396.

and Sanford and Ross, District Judges) setting aside, in part, the order of the Commission in *Tennessee Rates and Charges*, 63 I. C. C. 160.

The order of the Interstate Commerce Commission, in so far as it was set aside by the district court, required certain railroad companies operating in the State of Tennessee to discontinue a discrimination against interstate commerce which the Commission found to exist as the result of intrastate rates, within the State of Tennessee, applicable to the transportation of stone and gravel for the United States, State, County, or Municipal governments, hereafter called municipal rates, which were lower by 25 per cent than corresponding interstate rates applied to the transportation of the commodities between points in Tennessee and points in other states.

The lower intrastate rates had been established as the result of an order of the Railroad and Public Utilities Commission of the State of Tennessee, hereafter called the Tennessee Commission.

PROCEEDINGS BEFORE THE INTERSTATE COMMERCE COMMISSION.

In *Increased Rates, 1920*, 58 I. C. C., 220, Ex Parte 74, the Interstate Commerce Commission authorized an increase of 25 per cent in freight rates on interstate commerce in the so-called southern group, which includes Tennessee. Shortly afterward, the railroad companies operating in Tennessee applied to the Tennessee Commission for authority to increase intrastate rates 25 per cent and thus raise

them to the level of the increased interstate rates. The Tennessee Commission permitted such an increase in intrastate rates generally, but refused to permit any increases in the rates on stone and gravel when for use in the construction of public highways and consigned to Federal, State, County, or Municipal authorities, or their bona fide agents; or in the rates on one or two other commodities which are not involved in this case. The Tennessee Commission did, however, permit increases in intrastate rates on commercial stone and gravel; that is, stone and gravel transported for others than the Federal, State, County, or Municipal governments.

Upon petition of the interested railroad companies, the Interstate Commerce Commission, pursuant to section 13(3) of the Interstate Commerce Act, instituted an investigation to determine whether the State rates, which the Tennessee Commission had refused to permit to be increased, were unlawful in their relation to interstate rates on the same commodities in that they caused or would cause any undue or unreasonable advantage, preference, or prejudice as between persons and localities in intrastate commerce on the one hand and interstate commerce on the other hand, in violation of sections 2 and 3 of the Interstate Commerce Act, or any undue, unreasonable, or unjust discrimination against interstate commerce in violation of section 13.

The Interstate Commerce Commission held hearings, at which the Tennessee Commission was repre-

sented, and on August 3, 1921, issued its report in which it found:

> * * * that the increases made by respondents in their interstate rates for the transportation of stone and gravel, in carloads, under our decision relating to the southern group in Ex Parte 74, results in reasonable charges for the interstate transportation of those commodities between points in Tennessee and points in adjoining states and that the failure of said respondents within the state of Tennessee correspondingly to increase their intrastate rates and charges for the transportation of stone and gravel when used in the construction of public highways and consigned to federal, state, county, or municipal authorities or their bona fide agents, in force on the date of our decision in Ex Parte 74, has resulted in the past and will result in the future in lower rates on those commodities than the corresponding interstate rates between points in Tennessee and points in adjoining states and in undue prejudice to persons and localities in interstate commerce between points in Tennessee and points in adjoining states; in undue preference to persons and localities in Tennessee; and in unjust discrimination against interstate commerce. (Record, p. 38.)

The rate situation resulting from the Tennessee Commission's order, with its obvious discrimination against interstate commerce and against "persons and localities in interstate commerce" and in favor of persons and localities in intrastate commerce, upon which the Commission's finding was based, is

illustrated by the following example selected from many described in the report:

> Crushed or broken stone, used in the construction of roads, is produced at a number of points in Tennessee, principally at Mimms, Newsom, Franklin, Carter's Creek, and Whitehead, in the vicinity of Nashville, and at Chattanooga, Chickamauga, Strawberry Plains, Mascot, and Knoxville, in eastern Tennessee. Producers at these points are in competition with quarrymen in adjoining states, who are shown to have been prejudiced by the action of the Tennessee commission. From Hopkinsville, Ky., a stone-producing point, to Sadlers, Adams, Cedar Hill, Kinney, and Springfield, Tenn., from 28 to 43 miles distant, the rate prior to Ex Parte 74 was 80 cents, or 10 cents lower than the intrastate rate from Franklin to the same stations for distances ranging between 48 and 63 miles. The rate from Hopkinsville has been increased to $1, reversing the former relationship, which properly reflected the differences in distance. There is also a 90-cent rate from Franklin to Gallatin, South Tunnell, Fountain Head, Portland, and Mitchellville, Tenn., for distances from 46 to 64 miles, which prior to August 26, 1920, was 10 cents higher than the rate from Bowling Green, Ky., a competing point, to the same destinations for distances between 27 and 45 miles. The Bowling Green rate is now 10 cents higher. (Record, p. 33.)

The following is also taken from the report:

> From figures based on actual movements of stone and gravel during the year ended

> September 30, 1920, respondents estimate that the refusal of the Tennessee Commission to permit the increases in rates on those commodities when used for road building is costing the Louisville & Nashville, the Nashville, Chattanooga & St. Louis, and the Southern railways, in the aggregate, about $16,445 annually. (Record, p. 38.)

The Commission entered an order requiring the railroad companies to remove the discrimination by increasing the intrastate rates in amounts corresponding to the increases which the railroad companies had made under the authority of Ex Parte 74 in their interstate rates between points within the State of Tennessee and points in other states.

The order reads, in part, as follows:

> It is ordered, That the common carriers by steam railroad parties to this proceeding, namely, * * * , according as they respectively participate in the transportation, be, and they are hereby, notified and required to cease and desist from practicing the undue prejudice, undue preference and advantage, and unjust discrimination found in said report to exist in the relation of interstate rates for the transportation of stone and gravel, in carloads, when for use in the construction of public highways and consigned to federal, state, county, or municipal authorities or their bona fide agents, and to establish, put in force, and maintain rates for the transportation of said commodities in intrastate commerce within the state of Tennessee which shall exceed the rates of said respondents for the

transportation of said commodities in effect July 29, 1920, and applicable to such transportation, in amounts corresponding to the increases heretofore made by said respondents and now in effect under Ex Parte 74 referred to in said report, in said respondents' rates for the transportation of said commodities in interstate commerce within the state of Tennessee and between points in the state of Tennessee and points in adjoining states; provided, however, that nothing in this order shall be construed as requiring or authorizing any common carrier to establish, put in force, or maintain any rate for the transportation of property in intrastate commerce which is greater than its corresponding rate contemporaneously in effect and applicable to the transportation of property in interstate commerce from, to, or at the same points. (Record, p. 39.)

PROCEEDINGS IN THE DISTRICT COURT.

On October 21, 1921, the State of Tennessee, the Railroad and Public Utilities Commission of Tennessee, and the State of Tennessee on Relation of the Railroad and Public Utilities Commission of Tennessee, filed a bill in the court below against the United States seeking to set aside the order of the Interstate Commerce Commission.

The bill alleges that the general authority of the Interstate Commerce Commission to remove discrimination against interstate commerce caused by intrastate rates does not include authority to remove such

discrimination when it results from lower intrastate municipal rates.

The following language of section 22 is relied upon by appellees:

> That nothing in this Act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments. * * *.

The United States moved to dismiss the bill. The Illinois Central Railroad Company, the Louisville & Nashville Railroad Company, and the Nashville, Chattanooga & St. Louis Railway intervened and adopted the motion to dismiss filed by the United States. The Interstate Commerce Commission intervened and filed an answer denying that it had exceeded its authority, denying that the order injuriously affected the petitioners, and praying that the bill be dismissed. The answer raised no issues of fact.

After hearing on the motion to dismiss and on the bill and answer, the court entered a final decree on April 4, 1922, overruling the motion to dismiss and perpetually enjoining the enforcement of the order of the Interstate Commerce Commission in so far as it applied to municipal rates. The following is quoted from the decree:

> 2. That the order of the Interstate Commerce Commission in the matter of intrastate rates and charges in the State of Tennessee, entered August 3, 1921, and identified on the

> docket of said Commission as No. 12,132, directing Steam Railroad Companies to establish, put in force, and maintain rates for the transportation within the State of Tennessee of stone and gravel, in carloads, when for use in the construction of public highways and consigned to federal, state, county, or municipal authorities or their bona fide agents, in excess of rates charged by said companies on such transportation at and prior to the time of the entry of said order, is adjudged to be void to the extent that the rates therein ordered to be established, put in force, and maintained, affect or apply to such transportation, for the United States, State or Municipal governments, of stone and gravel, the title to which has passed to the government or is vested in it at the point of the origin of its transportation; and that to the extent that said order of the Interstate Commerce Commission is herein above adjudged to be void, and to that extent only, it be and hereby is annulled and set aside, and that the enforcement thereof be and hereby is perpetually enjoined. (Record, p. 52.)

A memorandum opinion was filed in which the court stated, among other things:

> * * * it [section 22] excludes this particular traffic [for the United States, State, or municipal governments] from the rate structure which the Commission is authorized to erect and control; in still other words, there is freedom in discrimination. (Record, p. 51).

ASSIGNMENTS OF ERROR.

There were twelve assignments of error which it is unnecessary to set out at length. This question is presented: Is the Interstate Commerce Commission without power, as the result of the provision of section 22 relative to reduced government rates, to protect interstate commerce from a discrimination growing out of intrastate rates on government shipments imposed by the authority of the State of Tennessee against the will of the carriers?

ARGUMENT.

APPELLEES' CONSTRUCTION OF SECTION 22 IS REPUGNANT TO THE SCHEME AND PURPOSE OF THE INTERSTATE COMMERCE ACT.

Appellees do not deny that the preferential municipal rates within the State of Tennessee are discriminatory against interstate commerce. They do not deny that the intrastate municipal rates, fixed by the order of the Interstate Commerce Commission to remove the discrimination against interstate commerce, are reasonable rates. In fact, the Tennessee Commission approved these rates for commercial shipments of stone and gravel within the state. Appellees merely claim that it is beyond the power of the Interstate Commerce Commission to remove this discrimination and, in support of their position, rely solely upon the provision of section 22, which they contend removes municipal rates, both state and interstate, from the control of the Interstate Commerce Commission, except

in so far as that control may be exercised to fix maximum municipal rates.

The provision in section 22 relative to reduced rates for the United States, State, or municipal governments appeared in the original act to regulate commerce approved February 4, 1887 (24 Stat. L. 379), in the following form:

> SEC. 22. That nothing in this Act *shall apply to* the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, * * *. [Italics ours.]

An act approved March 2, 1889 (25 Stat. L. 825), amended the provision so as to read:

> SEC. 22. That nothing in this Act *shall prevent* the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, * * *. [Italics ours.]

It seems manifest from the amendment that Congress did not intend that government rates should be withdrawn from the application of the statute.

The purpose of the provision was merely to declare that a railroad would not be guilty of granting a discrimination if it should give more favorable rates to shipments for the government than to shipments for "an ordinary person." *Interstate Com. Commiss.* v. *B. & O. Railroad*, 145 U. S. 263, where it was said at page 278:

> Indeed many if not all, the excepted classes named in section 22 are those which, in the absence of this section, would not necessarily

> be held the subjects of unjust discrimination if more favorable terms are extended to them than to *ordinary passengers*. Such, for instance, are property of the United States, State, or municipal governments. * * *. [Italics ours.]

The provision is permissive only; it does not give the Interstate Commerce Commission power to require that reduced rates be granted to the state and it does not give the state a right to demand such rates.

In *Dairymen's Supply Co.* v. *P. R. R. Co.*, 28 I. C. C. 406, it was said:

> But, while the act authorizes the free transportation of property for the purposes named, it does not require the carriers to grant such transportation. It follows that the carriers may grant such transportation or deny it, as they deem best, * * * .

In *Metropolitan Paving Brick Co.* v. *Ann Arbor R. R. Co.*, 17 I. C. C., 198, it was said:

> What carriers may do is one thing and what they ought to be required to do is quite another thing. Certainly the Commission has no power under the law to order carriers to transport traffic for the United States, state, or municipal governments at reduced rates.

The fact that section 22 does not confer a right upon the state to demand a preferential rate was recognized by the district court in this case. We quote from its opinion:

> Of course this giving of a preference under section 22 is wholly permissive; the section

> does not confer upon any municipality the right to demand a preference. (Record, p. 51.)

Section 22 gives the carrier the right to carry for the state at reduced rates, but the only right which it gives to the state is the right to accept such rates if the carriers see fit to give them.

There is no allegation in the bill that the carriers are willing to apply reduced municipal rates within the State of Tennessee. On the contrary, it clearly appears that they are not willing to do so. The State of Tennessee can not be heard to complain that the Commission's order invades the rights of the railroad companies by denying them a right to grant a discrimination which they do not wish to grant. In *Interstate Comm. Com.* v. *Chi., R. I. & Pac. Ry.*, 218 U. S., 88, 109, this court stated:

> * * * That the companies may complain of the reduction made by the Commission so far as it affects their revenues is one thing. To complain of it as it may affect shippers or trade centers is another. We have said several times that we will not listen to a party who complains of a grievance which is not his. * * *.

The district court in this case, after saying that section 22 did not confer upon the state the right to demand preferential rates, said:

> Nevertheless, the existence of the power is of value to the municipalities. They thereby get the right to competition in rates among the carriers for this traffic. The carriers at present do not wish to compete in this partic-

> ular, but any order which prevents them from so doing whenever they may desire to operates directly to prejudice and destroy the municipal right which is recognized and preserved by section 22. (Record, p. 51.)

But the right of the state to receive preferential rates, if the carriers desire to grant them, is no right at all in the absence of a willingness by the carriers to give such rates.

Prior to the amendments of the Transportation Act, 1920, the purpose of the act to regulate commerce was to do away with unreasonable rates and with rates that discriminated against persons and localities. The statute as amended, however, has broader purposes. It is designed to develop an adequate transportation system for the people of the United States and to accomplish this purpose it imposes an affirmative duty on the Interstate Commerce Commission to fix rates which will produce a fair yield to the carriers upon the value of their properties. Congress intended that intrastate commerce should produce its just and proportionate share of the requisite revenue and to this end empowered the Interstate Commerce Commission to fix intrastate rates when it became necessary to do so in order to protect interstate commerce from a burden and discrimination resulting from inadequate, state imposed, intrastate rates. The purpose and scope of the Interstate Commerce Act as amended by the Transportation Act, is set forth in *Wisconsin R. R. Com.* v. *C. B. & Q. R. R. Co.*, 257 U. S., 563, 582, as follows:

The Interstate Commerce Act of 1887, 24 St. 379, was enacted by Congress to prevent interstate railroad carriers from charging unreasonable rates and from unjustly discriminating between persons and localities. * * * Whatever the causes, the fact was that the carrying capacity of the railroads did not thereafter develop proportionately with the growth of the country, and it became difficult for them to secure additional investment of capital on feasible terms. When the extraordinary demand for transportation arose in 1917, the Congress and the President concluded to take over all the railroads into the management of the Federal Government, and by joint use of facilities, which the Anti-trust Law was thought to forbid under private management, and by use of Government credit, to increase their effectiveness. This was done by appropriate legislation and executive action under the war power. From January 1, 1918, until March 1, 1920, when the Transportation Act went into effect, the common carriers by steam railroad of the country were operated by the Federal Government. Due to the rapid rise in the prices of material and labor in 1918 and 1919, the expense of their operation had enormously increased by the time it was proposed to return the railroads to their owners. The owners insisted that their properties could not be turned back to them by the Government for useful operation without provision to aid them to meet a situation in which they were likely to face a demoralizing lack of credit

and income. Congress acquiesced in this view. The Transportation Act of 1920 was the result. It was adopted after elaborate investigations by the Interstate Commerce Committees of the two Houses.

* * * * *

Under Title IV, amendments were made to the Interstate Commerce Act which included Section 13, paragraphs 3 and 4, and Section 15a, already quoted in the margin. The former for the first time authorizes the Commission to deal directly with intrastate rates where they are unduly discriminating against interstate commerce—a power already indirectly exercised as to persons and localities, with approval of this court in the *Shreveport* and other cases. The latter, the most novel and most important feature of the act, requires the Commission so to prescribe rates as to enable the carriers as a whole, or in groups selected by the Commission, to earn an aggregate annual net railway operating income equal to a fair return on the aggregate value of the railway property used in transportation. For two years the return is to be 5½ per cent, with ½ per cent for improvements, and thereafter is to be fixed by the Commission.

* * * * *

It is manifest from this very condensed recital that the act made a new departure. Theretofore the control which Congress through the Interstate Commerce Commission exercised was primarily for the purpose of preventing injustice by unreasonable or dis-

criminatory rates against persons and localities, and the only provisions of the law that inured to the benefit of the carriers were the requirement that the rates should be reasonable in the sense of furnishing an adequate compensation for the particular service rendered and the abolition of rebates. The new measure imposed an affirmative duty on the Interstate Commerce Commission to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States. This is expressly declared in Section 15a to be one of the purposes of the bill.

Intrastate rates and the income from them must play a most important part in maintaining an adequate national railway system. Twenty per cent. of the gross freight receipts of the railroads of the country are from intrastate traffic, and fifty per cent of the passenger receipts. The ratio of the gross intrastate revenue to the interstate revenue is a little less than one to three. If the rates, on which such receipts are based, are to be fixed at a substantially lower level than in interstate traffic, the share which the intrastate traffic will contribute will be proportionately less. If the railways are to earn a fixed net percentage of income, the lower the intrastate rates, the higher the interstate rates may have to be. The effective operation of the act will reasonably and justly require that intrastate traffic should pay a fair proportionate share of the cost of maintaining an adequate railway system. Section 15a con-

> fers no power on the Commission to deal with intrastate rates. What is done under that section is to be done by the Commission "in the exercise of its power to prescribe just and reasonable rates," i. e., powers derived from previous amendments to the Interstate Commerce Act, which have never been construed or used to embrace the prescribing of intrastate rates. When we turn to paragraph 4, Section 13, however, and find the Commission for the first time vested with a direct power to remove "any undue, unreasonable, or unjust discrimination against interstate or foreign commerce," it is impossible to escape the dovetail relation between that provision and the purpose of Section 15a. If that purpose is interfered with by a disparity of intrastate rates, the Commission is authorized to end the disparity by directly removing it, because it is plainly an "undue, unreasonable, or unjust discrimination against interstate or foreign commerce," within the ordinary meaning of those words.

The construction which appellees put upon section 22 is clearly repugnant to the system of regulation provided by the Interstate Commerce Act, in that it would leave state authorities free to burden interstate commerce by requiring interstate carriers to transport government shipments within the state at inadequate and noncompensatory rates. The history of section 22 furnishes no foundation for a contention that Congress intended such a result.

The provision relative to reduced government rates must be interpreted in the light of the other provisions of the statute and in harmony with the general purposes of the statute.

In *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, in construing another provision of section 22, which reads:

> * * * and nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies,

his court said at page 446:

> This clause, however, cannot in reason be construed as continuing in shippers a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the Act.

The court held that, regardless of the proviso, a ipper could not maintain an action at common law a state court for excessive and unreasonable freight tes exacted on interstate shipments where the rates arged were those which had been lawfully fixed by e carrier according to the act, and had not been nd to be unreasonable by the Interstate Comree Commission.

Appellees say that discriminations must inevitably lt from the transportation, at reduced rates for Government, referred to in section 22. In *Dairy-'s Supply Co.* v. *P. R. R. Co.*, *supra*, the Interstate

Commerce Commission, speaking of such transportation, said:

> * * * The carriers may grant such transportation or deny it as they deem best, providing their practices in that respect do not result in unjust discrimination under section 2, or undue preference or prejudice under section 3, of the Act.

Assuming, however, that certain incidental discriminations will arise because of reduced municipal rates permitted by section 22, it certainly can not be said this section inevitably or naturally results in such systematic widespread discrimination against interstate commerce as results from the order of the Tennessee Commission.

There can be no doubt of the general authority of the Interstate Commerce Commission to fix interstate rates, including those applicable to transportation for the Government, and to fix intrastate rates also when this is necessary to remove a discrimination against interstate commerce. If the Commission's power in this respect is subject to the right of the railroad companies to transport Government shipments free, or at reduced rates, by virtue of section 22, the rates established by the Commission are, nevertheless, the lawful rates except in so far as the carriers may see fit to exercise the right which they have to carry for the Government at reduced rates.

THE ORDER OF THE INTERSTATE COMMERCE COMMISSION WILL NOT PRODUCE A DISCRIMINATION AGAINST MUNICIPAL INTRASTATE RATES.

It is argued that if the order of the Interstate Commerce Commission is permitted to stand, the result will be a discrimination against Government shipments within the State of Tennessee and in favor of Government shipments between points in Tennesse and points in other states, for the reason that the carriers, by virtue of section 22, are at liberty to charge less than their published interstate rates while their intrastate rates would be fixed by the order. The inconsistency of this contention with other contentions advanced by appellees is at once apparent. Furthermore, there is nothing in the order of the Interstate Commerce Commission which would prohibit the carriers from reducing their charges for intrastate government transportation to meet any reductions of corresponding charges for government transportation between points in Tennessee and points in other states. Attention is called to the following proviso in the order:

> * * * Provided, however, that nothing in this order shall be construed as requiring or authorizing any common carrier to * * * maintain any rate for the transportation of property in intrastate commerce which is greater than its corresponding rate contemporaneously in effect and applicable to the transportation of property in interstate commerce from, to, or at the same points. (Record, p. 40).

CONCLUSION.

The Tennessee Commission attempted to throw a part of the cost of road building, within the state, upon interstate commerce by requiring the railroads to maintain intrastate rates, applicable to the transportation of stone and gravel to be used in such road building, lower by 25 per cent than the rates applied on corresponding interstate transportation of the same commodities. The effect of its order is to favor and prefer localities within the state as against localities without the state and to require interstate carriers to perform transportation within the state at rates which will not produce their just share of revenue and which will therefore leave an undue and discriminatory burden to be borne by interstate commerce. The only rates involved in this case are rates on stone and gravel. But if the State authorities are free to burden interstate commerce by requiring carriers to maintain reduced intrastate municipal rates on these commodities, they are equally free to require carriers to maintain reduced intrastate municipal rates on all other commodities. Furthermore, they are free to require carriers to maintain reduced intrastate rates "for charitable purposes, or, to and from fairs and expositions for exhibits thereat," and for other purposes mentioned in section 22. The aggregate volume of this traffic is very large and the burden which the States may throw upon interstate commerce, if appellees' contention is sound, is a heavy one. The statute

places upon the Interstate Commerce Commission the duty to protect interstate commerce from burdens growing out of discriminatory, state imposed, intrastate rates. We submit that this Commission has authority to remove such a discrimination as was brought about by the order of the Tennessee Commission, and that the district court should have dismissed the bill of complaint.

J. CARTER FORT,
For Interstate Commerce Commission.
P. J. FARRELL,
Of Counsel.
MARCH, 1923.

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